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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 491

EDWARD J. GAY PLANTING & MANUFACTURING CO., LTD.,
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Edward J. Gay Planting & Manufacturing Co., Ltd., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing cause (Docket Number 10965). That Court's opinion was rendered on June 23, 1944 and is reported in 143 Fed. 2d 452.

### JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), and by the Rev-

enue Act of 1936, Title VII, Section 906(g) as amended by Section 510(j) of the Revenue Act of 1942 (56 Stat. 969) printed in the Appendix hereto.

## SUMMARY STATEMENT OF MATTERS INVOLVED.

Edward J. Gay Planting & Manufacturing Co., Ltd., herein for convenience called Gay, was a grower and processor of sugarcane, and during the period from June 8, 1934, through November 30, 1935, paid processing taxes totaling $27,419.30 under the Agricultural Adjustment Act of 1933 as amended. It filed a claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United States Processing Tax Board of Review.

That Board heard the cause. The entire evidence consisted of a stipulation. Thereafter, and before the Board decided the cause, jurisdiction was transferred to the Tax Court of the United States by Section 510 of the Revenue Act of 1942.

The Tax Court found the facts as stipulated by the parties (R. 35) and decided that Gay was not entitled to a refund of any portion of the processing tax paid.

Gay appealed to the Circuit Court of Appeals and limited its prayer to a judgment based on the margin computation provided by statute.

The refund of processing taxes paid under the Agricultural Adjustment Act as amended—which was invalidated by this Court in *U. S.* v. *Butler* (297 U. S. 1) on January 6, 1936—is controlled by Title VII of the Revenue Act of 1936 set forth in the Appendix hereto. The statute provides in Section 907 for a margin computation. The result of that margin computation establishes a prima facie presumption of the tax burden borne or shifted, although the party adversely affected can rebut such margin presumption by evidence of the actual extent to which the tax burden was borne or shifted.

In the instant case, the margin computation was not rebutted and the sole issue before the Circuit Court was the determination of the margin. If the margin was computed by using the actual cost of the commodity processed pursuant to Section 907 (b)(5)(a) it created a presumption in favor of Gay to the extent of a tax burden borne of $16,078.95—if the margin was computed by using the current market value of the commodity processed at the time of processing pursuant to Section 907 (b)(5)(b) the presumption created was that Gay bore none of the tax burden.

The Circuit Court had theretofore held in *Commissioner* v. *Bain Peanut Co.* (134 F. (2d) 853) that actual cost is exclusive if available. The stipulation, comprising the entire evidence, set forth the facts and figures necessary to determine the margin on either premise, and Gay relying on *Commissioner* v. *Bain Peanut Co.* (*supra*) contended that actual cost should be used in determining the margin presumption.

The Circuit Court agreed that actual cost if available should be used; but, by—on its own volition—going beyond the plain words of paragraph 11 of the stipulation and placing its own construction thereon held that cost had not been established. Hence from Gay's viewpoint this is the:

## QUESTION PRESENTED.

Can the Court disregard the judicial admission made by Counsel in a Stipulation and hold from other unrelated parts of the said Stipulation that the fact is unproven?

## REASONS FOR GRANTING THE WRIT.

Here Counsel presented but one question to the Court below, that is whether in computing margins actual cost of commodity is controlling, or whether, in the alternative, current market prices at the time of processing could be substituted. All the facts were stipulated. The Stipulation constituted the entire evidence. At the time the Stipulation was filed with the trial court the question was un-

decided. Both parties had determined to stand or fall on the prima facie presumption—nothing remained but to have a Court determine the manner of computing the margin presumption. Subsequent to the Gay trial the Fifth Circuit did decide the question in *Commissioner* v. *Bain Peanut Co.* (*supra*) and it appeared as though the Fifth Circuit would give judgment for Gay.

Counsel for the Respondent in his brief and argument attempted to vary the plain words of the stipulation by linking to the pertinent paragraph other paragraphs entirely unrelated to the question of actual cost; and, proposed that if the Court disagreed, that the cause be remanded.

The Circuit Court accepted respondent's argument and disregarded the part of the stipulation that stipulated actual cost (par. 11, R. 51) deciding that it stood upon its previous decision in *Commissioner* v. *Bain* (*supra*) but that here Gay had not given the Court a cost to apply.

By so holding, and accepting the argument of Counsel for Respondent, the Court destroyed the conclusive nature of judicial admissions, and if permitted to stand, will destroy all judicial procedure and the administration of justice, by making worthless all stipulations that cover more than one fact.

The Circuit Court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

## CONCLUSION.

Wherefore, it is respectfully requested that a writ of certiorari issue.

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